Thoughts on Kenosha

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This is being written the day after the not guilty verdict in the Kyle Rittenhouse case. I assume you know the basics of the case. Over the past year, I paid about as much attention to the case as the average person, no more than that. It was streaming the trial the past couple of weeks that got me thinking. This is to share some of what has come up for me for your consideration.

I was impressed with Rittenhouse on the stand and his two defense attorneys. This contrasted with my take on the defense attorney in the Derek Chauvin case, Eric Hanson (Chauvin didn't testify), whom I took a close look at as part of writing a critique of his closing argument.[1] I wound up concluding that Chauvin's defense couldn't have been worse. Taking in Rittenhouse's lawyers' performance was an affirmation of what I wrote about Chauvin's defense, including the bad decision not to have Chauvin testify.

I was somewhat disappointed with Mark Richards' closing argument in defense of Rittenhouse. Don't yell at a jury, don't fume. Positively, conversationally, respectfully, share your wisdom. Explain that Rittenhouse had a legal right to be armed with the weapon he possessed that night. Don't trash the people who died or were injured. Calmly explain why, in accordance with Wisconsin law—and, really, human law—Rittenhouse believed he was in danger of death or great bodily harm and justifiably acted as he did. Personalize it—show how this 17-year-old perceived this circumstance with remarkable maturity and accuracy; indeed, if he hadn't defended himself, he would have ended up dead or severely injured. Point out that the prosecution introduced the false notions that possession of a weapon and provocation preclude self-defense. And pull up your pants and button your coat.

The prosecution in the Rittenhouse case piqued my interest. I wondered what they were up to. They charged Rittenhouse with six

counts, six violations of Wisconsin law. One of the six, that Rittenhouse had no right to possess the AR-15 he had that night, was dismissed because it was factually ungrounded. I asked myself, how could the prosecution have missed that? As for the other five counts, despite what I was reading and hearing about how complicated the case was—all the possible angles and verdicts—it came down to a self-defense case. Was shooting those three people, killing two of them, self-defense as defined by Wisconsin statute? I checked into the relevant section of that statute:

> **939.48 Self-defense and defense of others.**
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> **(1)** A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

Watching the testimony and the videos shown the jury—remarkably, all three shootings were recorded—I couldn't figure out how the prosecution thought they could get a conviction on any of the charges. There was no way I could envision twelve people unanimously agreeing that any of the three shootings wasn't self-defense. The best the prosecution could get was a hung jury, one or two jurors refusing to go along with an acquittal. If a hung jury is the best they could do, what did the prosecution get out of bringing this case to trial? When the jury went into a fourth day without reaching a verdict, I speculated that an outlier juror was holding up an acquittal and that there was a good chance of a hung jury. I never imagined a conviction.

When the not-guilty-on-all-counts verdict came in, I was taken by how similar the response from those opposed to it was to that of the people who didn't like the grand jury's decision in the Michael

Brown case in Ferguson, Missouri back in 2014, a case I wrote about.[2] The Ferguson case had been headline news for three months with a strongly racial story line: unarmed Black teenager murdered by racist White cop. In the Brown case, the evidence and testimony the grand jury reviewed in the process of coming to its decision was released to the public. It put Brown in a very unfavorable light. Plus, there was the compelling fact—compelling to me anyway—that a grand jury of twelve local citizens had concluded that there was no probable cause to charge Officer Darren Wilson with a crime.

It intrigued me that none of that had the slightest impact on the those who had decided day one that Brown's death was yet another instance of the murder of Black men by a White police officers, and that it was symptomatic of the pervasive racial injustice in America. These people didn't speak to the new information from the grand jury, didn't refute it or explain it away, didn't incorporate any of it into how they looked at the case. For them, the grand jury report didn't exist, or it didn't compute; in any case, it didn't matter. What did matter was a narrative, a story: from the earliest days of America, Black people have been oppressed by White people. They simply plugged what happened in Ferguson into that narrative. They reiterated the position they held before the grand jury report: Brown had been shot with his hands up (or in the back) trying to surrender and a terrible thing is still going on in America.

In the days following the grand jury decision, protests by those outraged by it erupted in Ferguson and a number of cities across the U.S., many of them violent. Left-leaning politicians and members of the media never missed a beat: racist White America was on display in Ferguson. President Obama weighed in, pointing out that the Michael Brown case reflected "real issues" around race in this country, and that we should "not deny them or try to tamp them down."

I won't bore you with the details, you know them; the Rittenhouse case was déjà vu all over again, with President Biden substituting for President Obama. Let the riots begin.

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An unpleasant truth about human beings may help us understand what's been going on: people will do just about anything, and sincerely believe just about anything, that will get their personal needs satisfied. And what are those personal needs? Sustenance and safety. Sex. Social approval and inclusion. Status. Self-worth and self-respect. Excitement and a good time. If you are in a position to satisfy people's basic needs, or wants—you own a movie studio, cable station, or a newspaper, control the internet, are a politician or clergyman, or you stand up in front of students seated in rows with a grade book in hand—you can get them to think and do just about anything. If its 1938 in Germany, you can make National Socialists out of them. If it's 1943 in America, you can get them to cross the Atlantic and anonymously slaughter these same National Socialists. If it's 2021 Facebook/*New York Times*/CNN America, you can create woke crusaders who will proudly set cars on fire in Kenosha, Wisconsin and chase down people and beat their heads in or kill them. Human beings are remarkably suggestible, malleable creatures.

Looking at the prosecutors and protestors in the Rittenhouse case from this satisfaction-of-basic-needs angle helps explain both. For the prosecutors, going to trial was a winning play even if a guilty verdict was highly unlikely and would cause Rittenhouse undeserved grief. Rittenhouse's grief--fear, anguish, disruption of his life, and so on—was his problem; they had their own needs to satisfy. Who knows, they might win the lottery and get a conviction, and even if they don't, they'll get the personal payoffs from fighting the good fight: feeling good about themselves and getting stroked and rewarded by the audience they play to. As for a protestor, hitting the streets with a book of matches and a crowbar makes you feel in

the know and righteous; you're somebody important, and it is exciting and fun and might even get you laid. All you have to do to make those good things happen for yourself is buy a simple story—the Rittenhouse case exemplifies White supremacy and racist, rotten-to-the-core America. Mucking around with the particulars of the case and reason and logic isn't the way to get your needs met.

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If you have problems with the prosecutors and protestors—or rioters, whatever you want to call them—in the Rittenhouse case, it would be worth your time to think up ways to make the sort of things they did basic needs aversive, call it that. As it stands now, charging obviously innocent people and setting buildings on fire are good personal moves. (Or at least they were for the Kenosha protestors until Rittenhouse showed up. Yell "Fuck you!' and go for his gun and instead of him giving it to you and cowering, he shoots your ass. Hell of a deal.)

Colorado attorney Andrew Branca suggests what he calls Kyle's Law as a way to put a crimp in politically motivated prosecutions in self-defense cases.

> **Too often, rogue prosecutors bring felony criminal charges against people who were clearly doing nothing more than defending themselves, their families, or others from violent criminal attack. We've seen this happen in the George Zimmerman trial in Florida a decade ago, in the Kyle Rittenhouse trial just completed in Kenosha WI, and in plenty of cases in between. These are cases where there is little or no evidence inconsistent with self-defense, such that there can be no good-faith reason for a prosecutor to drag that defender to trial.**[3]

Branca points out that in these circumstances the prosecutor very likely will not get a conviction, but he will get

personal aggrandizement and political capital. And no matter how it turns out, the defender will lose big: demonized by the media as a murderer, racist, and white supremacist; emotional stress; fear for his safety; the loss of income and educational opportunities; a failed relationship or marriage; and the prospect of never living a normal life. It's time, Branca declares

> **to compel prosecutors to have skin in the game, to have something to lose if they bring a laughably weak, yet horribly destructive, felony prosecution in a case of self-defense. And it's time to provide a path for the wrongfully prosecuted defender to get compensation for his monetary, reputational, and emotional damages.**

Branca argues that a prosecutor has no business bringing a self-defense case to trial unless at least 90% of the evidence counters a self-defense claim. He proposes that in every self-defense case, the jury instruction on self-defense includes this question: "If you are acquitting this defendant on the grounds of self-defense, did you find that the prosecution failed to disprove self-defense by a majority of the evidence?" If the answer is yes to that question, the defendant would receive compensation for losses that resulted from this prosecution. The compensation would come from both the state and the prosecutor personally. Branca notes that Washington State already has a statute that does precisely this. Might the prosecution in Wisconsin have decided not to proceed with its obviously unjust charges against Rittenhouse if such a statute had existed in that state?

Defense of one's person was the central element in the Rittenhouse case. But what about the defense of property? What about making rioting and looting and the wanton destruction of what other people have created less personally rewarding? In Kenosha, the rioters were free to run wild smashing and burning to their hearts content with the police parked in their cars at a safe distance. I had

always assumed that the first responsibility of government was to protect life and property from threats "both foreign and domestic," as it was put. But this is the new America, or so those in power tell us anyway. As for the citizenry, we have been conditioned to hide out in our basements until things blow over.

Watching the Rittenhouse trial and taking in the media coverage, I picked up the idea that we have no business defending our property. That's the government's business, if they decide to take it on, which increasingly they have decided not to. The best we can do is hope the rampagers will call it a night before they sacrifice what we have produced to what they have going that evening. This sounds like the pussification of my country and me, if you'll pardon the term. There was a time in my life when there would have been outrage from the president on down at what went on in, among other places, my hometown of Minneapolis. It wouldn't have been "Please be peaceful." It would have been "We're not going to stand for violence and destruction!"

While I was looking up the Wisconsin statute on the defense of one's person, I checked the one about the defense of property and found this.

> **939.49 Defense of property and protection against retail theft.**
> **(1)** A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with the person's property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference. It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property.

My reading of this statute is that, at least in Wisconsin, while you can't use force that could cause death or great bodily injury to protect your property, you can indeed use force. You don't have to

stand by and watch somebody burn down your house or place of business. That got me thinking about what besides deadly force might make, say, smashing windows and burning cars at that car dealership in Kenosha an unrewarding experience. What if the rioters were sprayed from head to toe with some kind of foam that looked and smelled like shit—stuff that wouldn't come off easily and itched like holy hell? Covered from head to toe in what looks like shit and stinking and itching frantically might make you look and feel less cool bashing car doors with a hammer. You'd look like the pile of dripping diarrhea you are.

Maybe, probably, my foam idea is no good, but how about getting people with more informed and creative minds than mine to come up with non-lethal, non-great-bodily-damage--and yes, personally humiliating—negative consequences to violent demonstrations. Perhaps a deterrent along these lines already exists (rubber bullets?). And perhaps there is an altogether different, better way to protect property. My hope is that you and I—maybe with the help of a few others—can successfully defend our property when our president, governor, mayor, and police chief have abandoned us, or at least go down swinging.

Endnotes

1. Robert S. Griffin, "If I Had Made the Closing Argument in Defense of Derek Chauvin," *The Occidental Observer*, posted May 13, 2021.
2. Robert S. Griffin, "Epistemology Matters: Reflections Prompted by a Death in Missouri, in the writings section of my website, http://www.robertsgriffin.com
3. Branca has a website. http://lawofselfdefense,com. The material on him in this article is from his publication, available on his sire, "Why Kyle's Law Matters."